

**Surrogacy and maternity rights:
making all mothers equal**

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The recent Advocate-General Opinion in the case of *CD v ST* C-167/12 raises important issues in the struggle for equal treatment for intended mothers whose babies are born through surrogacy arrangements in the UK.

Surrogacy and maternity rights

Surrogacy arrangements are lawful in the UK. They involve a woman, the surrogate mother, becoming pregnant by way of artificial insemination and giving birth to a child for intended parents. UK provisions require that there must be two intended parents who may be same sex or opposite sex, married, in a civil partnership or not. At least one of the intended parents must be genetically related to the child.

Intended parents immediately begin parenting the child at birth and apply for a parental order between six weeks and six months after the birth of the child. Once granted they are given full legal parental responsibility for the child and the surrogate mother relinquishes all rights. Approximately 40-70 babies are born through surrogacy arrangements in the UK every year.

In terms of maternity provision, a surrogate mother is treated in the same way as any other pregnant woman and is afforded full maternity rights of up to one year's maternity leave. Intended parents, however, are currently left in legal limbo, reliant on the goodwill and fair-mindedness of their employer. There is no express requirement for equivalent leave.

This means that the intended parents have no legal rights to enable them to bond with and care for their new baby. The absence of any legal right to maternity leave applies even though the intended mother may be breastfeeding her baby after inducing

lactation. There is also a knock-on effect in the sense that the second parent cannot avail of extended paternity/co-parenting leave provisions.

The inequality extends to the whole family.

The CD case

CD* applied for leave to care for her newborn in advance of her child's birth, in the same way as any mother. She was refused adoption leave from her employer because she was unable to produce a 'matching certificate' as set out in the adoption leave policy. She did not have a MAT B1 form from her midwife, because she was not herself pregnant, meaning she could not meet the requirements of the maternity leave policy. She was essentially refused leave because of a missing piece of paper.

CD is a mother with full parental responsibility for her child. She breastfed her child within the first hour of life and continued to do so for a number of months. Yet in the crucial months leading up to the birth she was in a limbo to the extent that she did not know whether she would be able have time off work to attend her own child's birth or have crucial time afterwards to bond with and care for her newborn (it should be noted that CD was eventually granted a period of paid leave following the involvement of UNISON. It was granted on a discretionary basis, meaning that the policy remains in place with her employer.)

UNISON lodged proceedings for CD in the Employment Tribunal arguing that she should be entitled to maternity leave and that the failure to make such provision was unlawful. The matter was referred directly from the Employment Tribunal to the Court of Justice of the European Union for a Preliminary Ruling in order to clarify protections afforded under EU law, including the Pregnant Workers' Directive (92/85).

The Advocate General

On 26 September 2013, Advocate General Julianne Kokott's Opinion was released. AG Kokott considers that:

"an intended mother who has a baby through a surrogacy arrangement has the right to receive maternity leave ... in any event where she takes the child into her care following birth, surrogacy is permitted in the Member State concerned and its national requirements are satisfied, even where the intended mother does not breastfeed the child following birth".

AG Kokott goes on to state that in her view, "the leave must amount to at least two weeks and any other maternity leave taken by the surrogate mother must be deducted", meaning that there is to be no doubling up of the maternity provision.

The Opinion importantly notes that maternity leave provided under the Pregnant Workers Directive is not solely to protect workers from risks during pregnancy, childbirth or while breastfeeding. AG Kokott states that provision also exists to protect the special relationship between a woman and her child in the period following pregnancy and childbirth. She notes that:

"in the same way as a woman who herself has given birth to a child, an intended mother has in her care an infant for whose best interests she is responsible. However, precisely because she herself was not pregnant, she is faced with the challenge of bonding with that child, integrating it into the family and adjusting to her role as a mother. This 'special relationship' between a mother and her child over the period which follows pregnancy and childbirth warrants protection

in the case of an intended mother in the same way as it does in the case of a biological mother".

AG Kokott distinguishes surrogacy from adoption by emphasising the nature of a surrogacy arrangement. It is entered into in advance, creating a bond between child and intended mother in advance of birth and following birth the intended mother assumes the full role of mother to that child. This distinction is important and insightful. It addresses concerns regarding inconsistency with the position for adoptive mothers for whom there is no EU law provision as raised by Advocate General Nils Wahl, in his Opinion released on the same day, in the case of *Z v A Government Department and the Board of Management of a Community School C-363/12*.

The question now remains as to how the Court will rule. Advocate General Opinions are not binding on the Court, although very frequently followed. The outcome is far from certain, but the law undoubtedly has been shown to require clarification.

* The Claimant in this matter is referred to as CD due to the existence of a Restricted Reported Order which prevents public identification of CD.